TEMPLER PARK GOLF & RESORT BHD & ANOR A

v.

TETUAN GEORGE VARUGHESE

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER J
[ORIGINATING SUMMONS NO: D-24NCC-136-2009]
9 APRIL 2010

COMPANY LAW: *Winding up - Injunction to restrain petition - Non-payment of solicitor's bill - Whether contents of bill bona fide - Whether possibility or irreparable harm caused to debtor be a cure for not honouring commitment to creditors - Whether application dismissed - Legal Profession Act 1976, ss. 126, 128* C

This was the plaintiff's application to restrain the defendant (solicitor) from presenting a winding up petition relating to non-payment of solicitors bill. The defendant had issued a total of 20 separate s. 218 notices to the plaintiffs relating to non-payment of their itemized solicitor's bill issued in essence pursuant to Solicitor's Remuneration Order 1980. The plaintiffs submitted, *inter alia*, that (i) the quantum was excessive; (ii) the defendant had failed to comply with ss. 126 and 128 of Legal Profession Act 1976; (iii) the plaintiffs were willing to deposit the monies claimed pending the invoices being taxed and the company was solvent. The defendant argued (i) it was an undisputed fact that the defendant had acted for the plaintiffs, for both contentious and non-contentious works and bills have been issued; (ii) at all material time the plaintiffs have not questioned, challenged or disputed the bills and (iii) the bills were all itemized bills giving full details of the nature of professional services rendered by the defendant. D E F G

Held (dismissing the plaintiffs' application):

(1) The contents of the solicitor's bill were presumed by law to be *bona fide* and the necessity to prove the contents of the bill and to tax the bill on the facts of this case did not arise due to several provisions of the LPA 1976. Under s. 124(2) once the bill had been delivered in compliance with sub-s. (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be H I

presumed until the contrary was shown to be a bill *bona fide* complying with this Act. Further, the bills issued pursuant to Solicitors Remuneration Order was never resisted from the first instance and now one year had lapsed (*Vije & Co v. Co-operative Central Bank Ltd*). (para 5)

(2) The plaintiffs' argument that they were commercially solvent could not on its own be a ground for preventing a petitioner (defendant) from presenting a petition on an undisputed debt (*Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd*). An irreparable harm that may be caused to the debtor company could not be seen as a cure for not honouring the commitment to the creditors. (para 5)

(3) The defendant's claim stood in law to be *bona fide* and the plaintiffs' claim that the sum claimed was *bona fide* disputed was not supported with contemporary objections against the bills and the line of arguments raised by the plaintiffs militated against the relevant provisions of LPA 1976. And in consequence, the plaintiffs' application must be dismissed with direction as they had stated that they were in a position to settle the bills. (para 5)

Case(s) referred to:

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd [2002] 2 CLJ 345 HC ***(refd)***

Mann v. Goldstein [1968] 1 WLR 1091 ***(refd)***

Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd [2007] 2 SLR 268 ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Pembinaan Lian Keong Sdn Bhd v. Yip Fook Thai [2005] 6 CLJ 34 HC ***(refd)***

RHB Bank Bhd v. Gunasingam Ramasingam [2002] 5 CLJ 544 HC ***(refd)***

Savant-Asia Sdn Bhd v. Sunway PMI-PILE Construction Sdn Bhd [2008] 6 CLJ 681 FC ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

Tetuan Putra Gill v. Hijaz Refinery (Pahang) Sdn Bhd & Anor [2009] 7 CLJ 495 HC ***(refd)***

TPPT Sdn Bhd v. Jurukur Berjasa [2009] 1 LNS 1221 HC ***(refd)***

United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd [1988] 2 CLJ 265; [1988] 2 CLJ (Rep) 511 HC ***(refd)***

Vije & Co v. The Co-operative Central Bank Ltd [1991] 2 CLJ 1403; [1991] 4 CLJ (Rep) 188 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Legal Profession Act 1976, ss. 124(1), (2), 126, 128

For the plaintiff - Sanjay @ Jegathesan S Mohanasundram; M/s Kadir, Andri & Partners
For the defendant - Ramesh K Supramaniam; M/s George Varughese

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiffs' application to restrain the defendant (solicitor) from presenting a winding up petition relating to non-payment of solicitors bill.

Brief Facts

[2] The defendant has issued a total of 20 separate s. 218 notices to the plaintiffs relating to none payment of their itemized solicitor's bill issued in essence pursuant to Solicitor's Remuneration Order 1980. The plaintiffs have not made any objections; or made any applications for taxation of the bill, as provided for under the Legal Profession Act 1976 (LPA 1976). However, the plaintiffs in this application *inter alia* complained that (i) the quantum is excessive (ii) the defendant has failed to comply with ss. 126 and 128 of LPA 1976 (iii) the plaintiffs are willing to deposit the monies claimed pending the invoices being taxed and the company is solvent. The defendant says (i) it is an undisputed fact that the defendant had acted for the plaintiffs, for both contentious and non-contentious works and bills have been issued (ii) at all material time the plaintiffs have not questioned, challenged or disputed the bills (iii) the bills are all itemized bills giving full details of the nature of professional services rendered by the defendant.

[3] And the defendant produces exhibits showing numerous correspondences to show that the plaintiffs have not challenged the bills and have on many occasions given assurance to the defendant's bills. And assert that more than one year has lapsed since the bills

were received by the plaintiffs. The plaintiffs and defendant relied on the following cases: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305; *Pembinaan Lian Keong Sdn Bhd v. Yip Fook Thai* [2005] 6 CLJ 34; *RHB Bank Bhd v. Gunasingam Ramasingam* [2002] 5 CLJ 544; *Vije & Co v. The Co-operative Central Bank Ltd* [1991] 2 CLJ 1403; [1991] 4 CLJ (Rep) 188; *Tetuan Putra Gill v. Hijaz Refinery (Pahang) Sdn Bhd & Anor* [2009] 7 CLJ 495; *JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd* [2002] 2 CLJ 345; *United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd* [1988] 2 CLJ 265; [1988] 2 CLJ (Rep) 511; *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5; *Savant-Asia Sdn Bhd v. Sunway PMI-PILE Construction Sdn Bhd* [2008] 6 CLJ 681; *Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd* [2007] 2 SLR 268.

Preliminaries

[4] As a general rule when bills for work done are *bona fide* disputed and the plaintiff is ready to deposit the sum, it is more likely the court will grant an injunction to restrain the defendant from presenting the petition (see *Mann v. Goldstein* [1968] 1 WLR 1091). I have dealt with this area of jurisprudence what is said to be "fortuna injunction" in *TPPT Sdn Bhd v. Jurukur Berjasa* [2009] 1 LNS 1221 and a number of other cases and I do not wish to repeat the same. When the dispute is to solicitor's bill, different jurisprudence applies as solicitors are a protected species, subject to the scrutiny by solicitors disciplinary board and/or the court in relation to bills for work done as provided for in LPA 1976. Dispute as to solicitor's bills must be challenged according to law and the mere assertion that the bills are *bona fide* disputed and the plaintiffs being ready and willing to deposit the sum claimed cannot be a ground to grant a "fortuna injunction".

[5] I have read the OS, affidavits and submission of the parties in detail. Both the counsels have dealt with relevant issues in detail. It will serve no useful purpose to repeat the same. After having given much consideration to the submission of the plaintiffs I take the view that the application must be dismissed with some directions. My reasons *inter alia* are as follows:

(i) The contents of the solicitor's bill are presumed by law to be *bona fide* and the necessity to prove the contents of the bill and to tax the bill on the facts of this case does not arise due to

several provisions of the LPA 1976. Under s. 124(2) once the bill has been delivered in compliance with sub-s. (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a bill *bona fide* complying with this Act. In *Pembinaan Lian Keong Sdn Bhd v. Yip Fook Thai; (supra)* where the bill was at all material times resisted by the plaintiff in that action who was seeking for an order to restrain the petition. Vincent Ng J (as he then was) had this to say:

> It is my conclusion, upon careful reading of the above provisions, that after the lapse of one year from the date of delivery of his bill, the solicitor may only sue for services rendered in a normal common law action, as he is precluded under s. 128(2) from petitioning for an order for taxation. Most pertinent to the issue at hand, I would hold that there is no deeming provision in the LPA, by virtue of which this court could hold that if the party chargeable fails to petition for an order for taxation within one year from the delivery to him of the bill of costs the amount stated in the bill would *ipso facto* be converted into a debt due and payable to the advocate and solicitor. The only presumption that appears in any of the above provisions is in s. 124(2), where if a bill is proved to have been delivered, "it shall be presumed until the contrary is shown to be a bill *bona fide* complying with this Act", and that "it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill". In my opinion, as this particular provision is couched with the words "in the first instance" in conjunction with the words "to be a bill *bona fide* complying with this Act", it ought to be construed as a provision merely designed to enable the solicitor to apply for an order for taxation after the expiration of one calendar month but within one year from the delivery of the bill; as he is then presumed to have complied with s. 124(1) of the LPA. Clearly, there is no presumption that the amount in the bill thereby becomes due and owing. Consequently, as the said sum of RM11,425.51 in the bill is not presumed to be due from the plaintiff to the defendant, and a *fortiori*, the said bill itself (delivered on 27 November 2001) has been at all material times vigorously resisted by the plaintiff, I would hold that the issuance of the s. 218(2)(a) notice was unwarranted and without justification.

In the instant case the facts will show that the bills issued pursuant to solicitors remuneration order was never resisted from the 1st instance and now 1 year has lapsed. In the case of *Vije & Co v.*

Co-operative Central Bank Ltd; (supra) a case which also involves a dispute on the solicitor's bills of costs, Justice VC George held that the defendant is not entitled to challenge or dispute the quantum of the bills after the lapse of one year from the time of the delivery of the bills. The court held:

> (1) Under the Legal Profession Act 1976 ('the Act'), the party chargeable or the person liable to pay the costs, if he disputes a solicitor's bill of costs, has to obtain by petition an order for the taxation of the bill. This has to be done within six months from the delivery of the bill. Section 128 of the Act provides that thereafter no order shall be made for taxation of a solicitor's bill of costs 'except under special circumstances to be proved to the satisfaction of the court'. However s. 128(1) provides that in any event no such order shall be made after the expiry of one year from the delivery of the bills of costs.
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> (2) It was clear that neither the defendant nor the receivers were entitled at this late stage to dispute the quantum of the said bills in respect of the litigation and in respect of opinion and advice.

(ii) The plaintiffs' argument that they are commercially solvent cannot on its own be a ground for preventing a petitioner (defendant) from presenting a petition on an undisputed debt. (see *Savant - Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd; (supra)*). An irreparable harm that may be caused to the debtor company cannot be seen as a cure for not honouring the commitment to the creditors though in suitable cases the court has wide discretion to provide adequate relief on equitable grounds. The Court of Appeal in the Singapore case of *Metalform Asia Pte Ltd v. Holland Leedon Pte Ltd (supra)* gave some guidelines on the factors the court will consider in exercising the discretion. And held that:

> (4) The possibility of irreparable harm being caused to a debtor company by the filing of a winding-up petition could not be a sufficient basis to grant an injunction. It was only one factor, *albeit* a significant factor, that justified the practice of restraining a creditor from filing a winding-up petition. The fact that irreparable harm might be caused could be neutralised by other factors, such as where the company was insolvent, or where a winding-up petition was the only means whereby a creditor could get the company to pay the debt. Another reason was that the *locus standi* of the petitioner might be put

in doubt where the company had a serious cross-claim on substantial grounds equal to or exceeding the creditor's debt, whether the latter was disputed or not.

(5) It was well established that in cases of an undisputed debt, a court would ordinarily direct a winding up. It was equally well established that in cases where the company disputed the debt claimed, a court would restrain a creditor from filing a winding-up petition, or if the petition had been filed, order a stay or dismiss it on the ground that the *locus standi* of the petitioner as a creditor was in question, and it was an abuse of process of the court for the petitioner to try to enforce a disputed debt using the winding-up process.

(iii) On the facts of the case it is clear that the defendant's claim stands in law to be *bona fide* and the plaintiffs' claim that the sum claimed is *bona fide* disputed is not supported with contemporary objections against the bills and the line of arguments raised by the plaintiffs militates against the relevant provisions of LPA 1976. And in consequence the plaintiffs' application must be dismissed with direction as they have stated that they are in a position to settle the bills.

[6] For reasons stated above, I make the following orders:

(a) The plaintiffs' application encl. 1 is dismissed with costs;

(b) The defendant be at liberty to proceed with the winding up petition if the sum stated in the statutory notice is not paid within five clear working days from the date of this order;

(c) In respects of costs I will hear parties' submission on the issue.

I hereby order so.